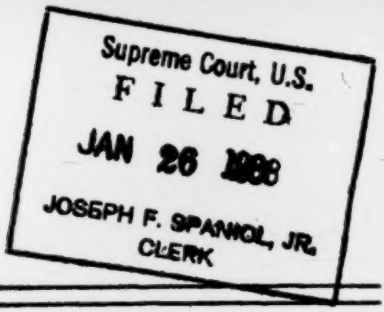
87-1242

NO.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROLAND LEE GOAD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROLAND LEE GOAD, Petitioner
310 Sara Lane
Huntsville, Texas 77340-6764
(409) 291-2430
(pro se)

February 1, 1988

106 P

QUESTIONS PRESENTED

1. Once jurisdiction had properly attached on the "little Tucker Act" claims, did the district court subsequently lose jurisdiction solely because the Air Force chose to continue making the challenged payments? (App. 36a).

2. Does the phrase "if it is in the interest of justice" contained in section 1631 of the Judicial Code furnish a valid basis for the district court to sua sponte enter a declaratory judgement reaching the merits of a case within the exclusive jurisdiction of another tribunal? (App. 4a).

3. Was the district court's refusal to transfer this case to the Claims Court to cure a want of jurisdiction, an abuse of its judicial discretion requiring reversal so as to avoid manifest injustice? (App. 27a).

4. Does a divorce decree apportioning "Air Force Retirement benefits" meet the specificity needed for a "court order" under Spouses' Protection Act? (App. 15a).

5. Does Petitioner have standing to claim monetary relief against the United States for the alleged unconstitutional taking of his pay? (App. 13a).

6. Are the direct payments made without an opportunity for a prior hearing, an unconstitutional taking of Petitioner's pay in violation of the Fifth Amendment? (App. 20a).

7. May Congress, by a declaratory statute, retroactively set aside the construction of a statute as already applied by the Supreme Court in an actual case, or direct the courts for the future to adopt a particular construction of a 196 year-old statute that Congress permits to remain in full force? (App. 20a).

8. Is military retired pay "current" or "deferred" compensation? (App. 16a-18a).

9. Do the garnishment restrictions in the Consumer Credit Protection Act apply to the collection of future earnings apportioned as property at divorce? (App. 18a).

10. Does the USFSPA preempt the long-standing rule under Texas practice which does not permit garnishment of an unliquidated demand?

11. Did Congress impermissibly delegate legislative power to State judges by permitting them to determine future entitlement to military pay during dissolution proceedings? (App. 25a-27a).

12. Did the district court act beyond its jurisdiction by the imposition of Rule 11 sanctions predicated on its conclusions of law concerning a matter in the exclusive jurisdiction of another tribunal? (App. 28a).

13. As a basis for its imposition of sanctions, did the district court impermissibly consider matters dehors the record?

14. Does the district court's order that Petitioner shall not file with that court any further causes of action until all monetary sanctions imposed have been paid in full impermissibly deprive Petitioner

of his First Amendment right to petition the Government for redress of grievances? (App.33a)

INDEX

TABLE OF CASES

STATUTES

MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

ROLAND LEE GOAD [1]

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The Petitioner, Roland Lee Goad, respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on December 9, 1987.

1./ This caption contains the names of all parties.

OPINIONS BELOW

The decision and opinion of the Court of Appeals, which will not be reported, appears in the Appendix. (App. 1a). The final judgement and the memorandum opinion and order rendered by the United States District Court for the Southern District of Texas, Houston Division, on June 5, 1987 has been reported in 661 Federal Supplement at 1073, and is reproduced in the Appendix (App. 6a-33a).

JURISDICTION

The decision and opinion of the Court of Appeals for the Federal Circuit was entered on December 9, 1987 and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES THAT THE CASE INVOLVES

The following constitutional and statutory provisions are involved in this case:

U.S. Const., Amnd. No. 1:

> Congress shall make no law respecting an establishment of religeon, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amnd. No. 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

10 U.S.C. § 1408(a)(2)(C):

> (a) In this section ...
>
> (2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement

incident to such previously issued decree). which ...

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

10 U.S.C. § 1408(c)(2):

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

10 U.S.C. § 1408(g):

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

10 U.S.C. § 1463(a)(1):

(a) There shall be paid from the Fund -

(1) retired pay payable to persons on the retired lists of the Army, Navy, Air Force, and Marine Corps.

15 U.S.C. § 1673(b)(1)(A):

(b)(1) The restrictions of subsection (a) of this section do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

15 U.S.C. § 1673(c):

(c) No court of the United States or any State, and no State (or officer or agency thereof) may make, execute, or enforce any order or process in violation of this section.

28 U.S.C. § 1254(1):

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of a party to any civil or criminal case, before or after rendition of judgement or decree.

28 U.S.C. § 1346(a)(2):

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the

Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1631:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any such other court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2201(a):

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgement or decree and shall be reviewable as such.

Fed. Rules Civ. Proc., Rule 11, 28 U.S.C.:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

37 U.S.C. § 701(c):

(c) An enlisted member of the Army or Air Force may not assign his pay, and if he does so, the assignment is void.

32 C.F.R. Part 63.3(e):

Court Order. As defined under 10 U.S.C. 1408 (a)(2), a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such decree. It includes a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree. The court order must provide for the payment to the member's former spouse of alimony, child support, or a division of property. In

the case of a division of property, the court order must specify that the payment is to be made from the member's disposable retired pay.

STATEMENT OF THE CASE

Petitioner's action brought pursuant to the Tucker Act (28 U.S.C. 1346(a)(2)) claimed amounts of his pay that had been diverted by the Air Force under the Uniformed Services Former Spouses' Protection Act (USFSPA). The Petitioner claimed $9,058.14 (App. 36a) and expressly did not ask for declaratory relief against the United States. He only claimed his back pay. During a pre-trial conference on April 13, 1987, the district court stated that Petitioner's claims had, by that time, aggregated to an amount above the $10,000 ceiling for its "little Tucker Act" jurisdiction, but, nevertheless, refused to transfer the case to the Claims Court stating that to do so "would not be in the interest of justice" (App. 14a). The district court then sua sponte entered a declaratory judgement that disposed of Petitioner's Tucker Act claims

(App. 14a-27a), granted the Government's motion for summary judgement, and dismissed Petitioner's Tucker Act claims and imposed a lump-sum Rule 11 sanction of $4,748.40 against the Petitioner based on its findings of fact and conclusions of law devolving from the declaratory judgement (App. 33a). The district court further imposed a non-monetary sanction ordering that Petitioner shall not file with the district court any further causes of action until all monetary sanctions imposed have been paid in full (App. 33a). On appeal, the Federal Circuit vacated the district court's grant of summary judgement (App. 3a) and remanded to the district court with instructions to dismiss the Tucker Act claims for lack of jurisdiction (App. 3a). Relying on the district court's "thorough analysis" as a basis for its action, (App. 4a) the Court of Appeals affirmed the imposition of sanctions (App. 5a). The

mandate issued by the Clerk of the Federal Circuit on December 21, 1987 (App. 5.1a) discloses that the district court judgement is AFFIRMED. Petitioner seeks review in this Court by this petition for certiorari.

Petitioner is a member of the Regular Air Force on the retired list entitled to earn pay for his continuing military status and his availability for recall to active duty if deemed in the interests of national defense by the Secretary of the Air Force.

Petitioner was divorced pursuant to a decree signed by a visiting judge in the 272nd District Court of Brazos County, Texas, on September 19, 1980. In an apportionment of community property, his former spouse was awarded a fraction of Petitioner's "Air Force Retirement benefits." (App. 18a). No appeal was taken.

On June 26, 1981, this Court held that retired pay was not a species of property

subject to apportionment in dissolution proceedings.[2]

On October 19, 1981, Petitioner's former spouse initiated an independent suit in State court seeking to vacate the property division aspects of the divorce decree and relitigate such apportionment so as to obtain an offsetting award of other property for the expected value of her interest in Petitioner's future pay. She was concurrently granted injunctive relief which encumbered all of Petitioner's tangible property. Petitioner's repeated efforts to have the action dismissed failed. It eventually terminated in Federal Court on April 16, 1987 (App. 56a).

The USFSPA was enacted, effective February 1, 1983, purporting to retroactively annul this Court's McCarty decision. The statute provides in relevant part that in the case of a division of community property, the "court

---

2 / McCarty v. McCarty, 453 U.S. 210 (1981).

order" must specify that the payment is to be made from the member's disposable retired pay.[3]

On June 24, 1985, Petitioner's former spouse requested the Air Force to honor the 1980 divorce decree apportioning "Air Force Retirement benefits" as a "court order" and to make payments to her of a portion of Petitioner's disposable retired pay. Her request was approved and payments began on September 3, 1985 and have continued each month to the present time. Petitioner's objections filed with the Air Force have all been rejected (App. 10a).

On Jan. 29, 1986, Petitioner brought a counterclaim in the pending State court action that had been on the docket since October 19, 1981 and joined the Air Force as a third-party seeking an order quashing, dissolving and re-

---

3./ 10 U.S.C. 1408(a)(2)(C); 32 CFR Part 63.3(e).

calling the writ of garnishment. The Air Force was joined in its capacity as garnishee, an indispensable party under Texas practice. The State action was then removed to Federal Court where the Government was severed as a defendant and the remaining actions between Petitioner and his former spouse were dismissed without prejudice. (App. 56a).

On September 8, 1986, Petitioner brought his Tucker Act claims in district court seeking recovery of the amounts of his pay that had been withheld up to that time, such sum being $9,058.14, an amount within the district court's jurisdiction (App. 34a).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the district court was based on Title 28, United States Code, Section 1346(a)(2) (The Tucker Act). The statute gives district courts concurrent original jurisdiction with the United States Claims Court over any action or claim to recover fees,

salary or compensation for official services of officers or employees of the United States not exceeding $10,000 in amount. Petitioner's claim for back pay is based on 10 U.S.C. 1463(a)(1) which provides that there shall be paid from the Department of Defense Retirement Fund "retired pay payable to persons on the retired lists of the Army, Navy, Air Force, and Marine Corps." Petitioner is a person on the retired list of the Air Force. At the time of filing, his claims aggregated to $9,058.14, an amount within the $10,000 ceiling for claims filed in district courts.

REASONS FOR ALLOWANCE OF THE WRIT

The decisions below have effectively sealed the doors of all courts in this Nation to the Petitioner and all similarly situated members of the armed forces, denying to them their First Amendment right to petition the Government for a redress of grievances. The decisions below also conflict with the dec-

isions of other Courts of Appeal, State courts of last resort and valid decisions of this Court; and also have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision so as to avoid manifest injustice and to correct the fundamental errors made in the disposition of this case by the courts below.

Tucker Act Jurisdiction

The controlling issue is the size of each individual claim, not the number of claimants. The rule was stated in this fashion: The fact that a party has two or more claims for $10,000 or less, does not deprive the district courts of jurisdiction. Fitzgerald v. Staats, 429 F.Supp. 933, 934-35 (D.D.C. 1977), aff'd 578 F.2d 435 (D.C. Cir.), cert. denied 439 U.S. 1004 (1978). Cf. 14 Wright & Miller, Federal Practice & Procedure, Sec. 3657 at p. 287, n.33 (2nd Ed. 1985). In this case,

Petitioner's claims (even if aggregated) at the time of filing, were within the jurisdiction of the district court. The court only lost jurisdiction (if, indeed it did lose its jurisdiction) because the Air Force chose to continue making the challenged deductions from Petitioner's pay after the original complaint had been filed in the district court. There seems to be a sufficient amount of confusion on this issue to justify this Court's plenary review.

Standing

The district court held that Petitioner had no standing to claim monetary relief from the United States because the USFSPA does not waive sovereign immunity for such claims (App. 13a). However, claims for military pay and allowances are actionable under the Tucker Act. Heisig v. United States, 719 F.2d 1153, 1155 (CA Fed. 1983). Under the Tucker Act one must only ask if the constitutional clause or

legislation which the claimant cites can fairly be interpreted as mandating compensation from the Federal Government for the damage or deprivation sustained. Kelly v. United States, 826 F.2d 1049, 1052 (CA Fed. 1987). Petitioner's claims are similar to the Kelly case. In that case the Government contended that Ms. Kelly could not obtain a monetary award because the statute establishing the Survivor's Benefit Program did not provide money damages for its violation. Furthermore, there is nothing in the USFSPA that would support a conclusion that it withdrew the Tucker Act remedy, because:

> A new statute will not be read as wholly or even partially amending a prior one unless there exists a "positive repugnancy" between the provisions of the new and those of the old that cannot be reconciled.

Blanchette v. Connecticut General Ins. Corps. 419 U.S. 102, 134 (1974). Also, (and most significantly) the USFSPA is not the statute under which Petitioner bases his claim for

back pay. His pay claim is based on 10 U.S.C. 1463(a)(1) which provides authority for the Air Force to disburse from the Department of Defense Military Retirement Fund "retired pay payable to persons on the retired list of the Army, Navy, Air Force, and Marine Corps."

Morton

The district court held that sovereign immunity shields the Government from liability so long as a "court order" is "regular on its face" and that the Tucker Act provides no basis for Petitioner's claims because the divorce decree is a "court order" and "regular on its face." This position is premised on this Court's holding in United States v. Morton, 467 U.S. 822, 836 (1984).

Section 1408(g) of title 10 only requires the Government to notify the Petitioner at his last known address, but there is no requirement that Petitioner actually receive any notice, and if he does get it, there is no

forum for asserting grounds for non-recognitio of the "court order." The Senate Report explains the statute:

> This subsection is designed to provide a measure of protection to the member whose pay is affected by a court order, so that the member may take whatever action, legal or otherwise, which the member may believe to be appropriate in response to the service of the court order. However, there is no requirement under subsection (g) that the member actually receive notice of the service of the court order; the only requirement is that such notice be sent.

Senate Report No. 502, 97th Cong., 2nd Sess.23 reprinted in 1982 U.S. Code, Cong. & Ad. News 1618.

These Air Force procedures have already been found constitutionaly infirm in Simononok v. Simononok, 787 F.2d 1517, 1521 (CA 11 1986) where the court stated that: "It is beyond peradventure that Government cannot take a portion of an individual's pay, pay to which he is statutorily entitled, and give it to another without at least complying with the requirements of due process." The court went

on to hold that Morton provided no bar to Major Simononok's claims. 787 F.2d at 1523. While Major Simononok sought damages in tort, Petitioner seeks a non-tort remedy under the Tucker Act. In contrast to Simononok, the district court expressly held that Morton precluded any recovery by Petitioner in circumstances virtually the same as the claims in Simononok. (App. 13a).

This Court has jurisdiction to review this case by certiorari to resolve this conflict between the Federal and Eleventh Circuits.

Garnishment for support

The district court asserted that the withholding of Petitioner's pay was not a garnishment and further that such withholding was in compliance with an "order for support" as defined in 15 U.S.C. 1673(b) (App. 18a-19a). For a withholding to fall within the support order exception, the order must be one "which is subject to judicial review."15 U.S.C.1673(b)(1)(A).

Furthermore, post-divorce spousal maintenance is contrary to public policy in Texas. The Texas Supreme Court expressly declined an invitation to characterize an award of railroad retirement benefits as spousal support in orde to circumvent federal law. Cf. Eichelberger v. Eichelberger, 582 S.W.2d 395, 402-403 (Tex. 1979). As the court observed: "This is a legislative, not a judicial function, and may req uire constitutional amendments which are the responsibility of the Legislature." 582 S.W.2d at 403. In Wissner v. Wissner, 338 U.S. 655, 659-660 (1950), this Court stated that a community property division of government insurance proceeds would constitute a seizure in violation of a provision against "attachment, levy, or seizure," and this Court was careful to identify a possible exception for alimony o child support cases. The basis for this exception was that family support obligations are deeply rooted moral responsibilities, while th

community property concept is more akin to an amoral business relationship. Later in Hisquierdo v. Hisquierdo, 439 U.S. 572, 587 (1979), this Court construed the amendment to authorize the garnishment of federal salaries for alimony and child support obligations to expressly override the anti-attachment provisions for support claims but not for community property claims, which are not based on need. This same proposition was affirmed in later cases: McCarty v. McCarty, 453 U.S. 210, 230 (1981); Ridgway v. Ridgway, 454 U.S. 46, 56-57 (1981); Rose v. Rose, 107 S.Ct. 2029, 2037 (1987). We note that Wissner was authored by Justice Tom Clark, a Texan with some knowledge of community property principles.

The district court's refusal to characterize the withholding as a garnishment flies in the face of a contemporaneous determination by the Texas Supreme Court that "The USFSPA provisions are intended only as a limit on the am-

ount of disposable retired pay which can be garnished and paid out by the service secretaries pursuant to court orders." Grier v. Grier, 731 S.W.2d 931, 933 (Tex. 1987). Also the California Supreme Court has determined that: "The Uniformed Services Former Spouses' Protection Act is primarily concerned with the garnishment of military retired pay." Casas v. Thompson, 720 P.2d 921, 931-2 (Cal. 1986), cert. denied 107 S.Ct. 659 (1987). The Eleventh Circuit has found that the direct payment procedures established pursuant to the USFSPA fits the definition of garnishment. Simononok v. Simononok, 787 F.2d 1517, 1521 n.12 (CA 11 1986). Justice White of this Court had occasion to refer to "direct garnishment" when discussing the procedures established pursuant to the USFSPA. Rose v. Rose, 107 S.Ct. 2029, 2045 (1987) (White, J., dissenting).

Garnishment of unliquidated demands

No authority exists under Texas practice

for a court to order a garnishee to pay monies that will come due at a future date. In United States v. Wakefield, 572 S.W.2d 569 (Tex.Civ. App. - 1978), the court refused to allow the garnishment of future accruing pay. In reversing the trial court that had ordered the garnishment, the appeals court cited Burkitt v. Glenny, 371 S.W.2d 412 (Tex.Civ.App. - 1963) for the proposition that garnishment is allowed only for a debt absolutely owed at the time the garnishee files his answer. Cf. Savings Bank of Danbury v. Loewe, 242 U.S. 357, 358 (1917); Wilhelm v. Department of the Air Force, 418 F.Supp. 162, 164 (S.D. Tex. 1976).

The Anti-Assignment Statute

Provision was made by the Act of May 8, 1792, Chapter 37, Section 4 (1 Stat. 280): "Sec. 4 And be it further enacted that no assignment of pay made after the first day of June next, by a non-commissioned officer or private shall be valid."

With only slight modification, this statute was codified in Title XIV, Section 1291 of the Revised Statutes of 1878. Attorney General Charles Devens explained its purpose. 15 Op. Atty.Gen. 271, 273 (1877). The statute is now codified in 37 U.S.C.701(c), and in simple shirtsleeve English commands that Petitioner's pay not be assigned. In construing this provision, this Court said:

> Retired pay cannot be attached to satisfy a property settlement incident to the dissolution of marriage. In addition, an Army enlisted man may not assign his pay. 37 U.S.C. § 701(c)...This limitation would appear to serve the same purpose as the prohibition against "anticipation" discussed in Hisquierdo, 439 U.S. at 588-589.

McCarty v. McCarty,453 U.S. 210, 228 n.22 (1981). The district court states that to the extent that 37 U.S.C. 701(c) might be construed as reflecting a policy against permitting the division of military retirement pay as community property, such a construction was vitiated by the passage of the FSPA, through which Congress has established a contrary

intention (App. 20a). The district court also asserted that the "direct payments" did not entail an assignment by the Petitioner. Id. This presents a fundamental constitutional question that may not lightly be ignored. (See question no. 7 at page ii supra.) The direct payments, by whatever name, involves an assignment of Petitioner's pay:

> The proceeding by garnishment is for the purpose of effecting a compulsory assignment of a claim by process of law. It is entirely obvious that if a claim be of such nature that the claimant cannot make a voluntary assignment of it, the law will not enforce a compulsory assignment.

St. Joseph Mfg. Co. v. Miller, 34 N.W. 235, 236 (Wisc. 1887).

Is retired pay "current" or "deferred" compensation ?

In McCarty[4] this Court reiterated the Government's century-old position that military retired pay is current compensation for continuing limited services, even though the decision was not based on this categorization. Permitting the pay to be treated as property

4. / 453 U.S. at 221-22.

earned by past military service in the context of State divorce law and current compensation for limited current service in the context of federal law, presents a situation difficult to reconcile. It would seem that military retired pay must be either deferred or current compensation, but not both. By definition, the terms are mutually exclusive. It is difficult to see how these two theories can coexist. Does the reversal of McCarty by Congress, then, also reverse the century-old doctrine reaffirmed by McCarty? In Texas, there has been considerable litigation to define "current wages." The term has been defined as compensation to be paid periodically or from time to time for personal services, as the services are rendered or the work performed. Miller v. White, 264 S.W. 176 (Tex.Civ.App. - 1924); First Nat'l Bank of Cleburne v. Graham, 22 S.W. 1101 (Tex.Ct. App. - 1889). The term has been construed

as necessarily implying the relationship of master and servant, or employer and employee. Past due wages left with the employer because they cannot be collected are exempt. Davidson v. F.H. Logeman Chair Co., 41 S.W. 824 (Tex. Civ.App. - 1897). A professional athlete, after completing his employment contract, was paid $80,000 per year in deferred compensation which was found to be exempt as current wages. Sloan v. Douglass, 713 S.W.2d 436, 438 (Tex. App. - 1986). Professional soldiers should be entitled to claim the same exemptions as professional athletes.

Does Petitioner's former spouse own all right, title and interest in, and to, a portion of Petitioner's future pay?

The district court asserted that Petitioner's former spouse now owns as her sole and separate property, a portion of Petitioner's future pay. (App. 17a). In McCarty, this Court expressed disapproval of a similar assertion stating that "the law of the State is not competent to do this." [5] This position is

5/ 453 U.S. at 233.

also at odds with the provisions of 10 U.S.C. 1408(c)(2) providing that the USFSPA does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. The Senate Report explains:

> A member has no right to transfer his retired pay on death. Nor can the member sell, assign, transfer, or otherwise dispose of the member's right to receive pay. It is for this reason that paragraph (2) of subsection (c) provides that a spouse or former spouse does not have any transferable right, title, or interest in the member's retired or retainer pay.

Senate Report No. 502, 97th Cong., 2nd Sess. 16, reprinted in 1982 U.S. Code, Cong. & Ad. News 1611.

Property law in general, and community property law specifically, treats spouses who receive a division of community property as the sole owner of that property. The attributes of sole ownership automatically attach, including the unfettered right to transfer or

dispose of the property without limitation. Retired pay, being an emolument of public office, has none of the essential attributes of community property - or even personal property. "The prospective salary or other emoluments of a public office are not the property of the officer nor the property of the State. They are not property at all. They are like daily wages unearned, and which may never be earned." Conner v. City of New York, 1 Seld. (5 N.Y.) 285, 296 (1851). "Such an officer has no property in the prospective compensation attached to his office, whether it be in the shape of salary or fees." Id. at 301. Cf. Taylor v. Beckham, 178 U.S. 548, 577 (1900).

Do the garnishment restrictions in the Consumer Credit Protection Act apply to enforcement of community property divisions of disposable retired pay?

Federal statutes are to be construed so as to achieve a uniform application throughout the United States, therefore, it is ent-

irely repugnant to our system of federalism that the statutory exemptions from garnishment provided in the CCPA are applicable to disposable retired pay received in Oklahoma but not in Texas. Cf. Evans v. Evans, 429 F.Supp. 580, 582 (W.D. Okla. 1976). This is especially true in light of the Congressional command that no court may make, execute, or enforce any order or process in violation of the CCPA. 15 U.S.C. 1673(c).

Did the district court impermissibly transgress its authority and jurisdiction by imposing monetary sanctions based on consideration of matters dehors the record? (App. 31a-32a).

In its findings of fact respecting the imposition of sanctions (App. 31a) the district court considered Petitioner's separate civil rights suit pending before a different federal judge, and a removed case that already been dismissed without prejudice by yet another federal judge (App. 56a) as the basis for its determination that Petitioner

Tucker Act claims were vexatious pursuant to Rule 11. However, the notes of the advisory committee following Rule 11 explain:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit scope of sanctions to the record.

Did the district court's action in this respect, show a clear abuse of discretion requiring this Court to exercise its supervisory authority to review the district court's action by way of certiorari so as to avoid manifest injustice?

> Does the district court's order that Petitioner shall not file with that court any further causes of action until all monetary sanctions imposed have been paid in full impermissibly deprive the Petitioner of his First Amendment right to petition the Government for redress of grievances?

This is the birthright of every American, and the accepted heritage of all civilized people. This right is regarded as equally sacred and guarded in the high precincts of

prominence and power as well as the remote and obscure dwelling place of the dispossessed and disfranchised citizen abiding at 310 Sara Lane in Huntsville - the Goad abode.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the decision and opinion of the Court of Appeals for the Federal Circuit entered on December 9, 1987 and the memorandum opinion and order of the District Court for the Southern District of Texas entered on June 5, 1987.

Respectfully submitted.

ROLAND LEE GOAD, Petitioner (pro se)
310 Sara Lane
Huntsville, Texas 77340-6764
(409) 291-2430

February 1, 1988

Unpublished opinion of the United States Court of Appeals for the Federal Circuit decided December 9, 1987.

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1488

ROLAND LEE GOAD,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

DECIDED: December 9, 1987

Before MARKEY, Chief Judge, NEWMAN and ARCHER, Circuit Judges. PER CURIAM

DECISION

Roland Lee Goad (Goad) appeals from a judgement of the United States District Court for the Southern District of Texas, 661 F.Supp. 1073 (S.D. Tex. 1987): (1) dismissing for lack of jurisdiction Goad's monetary claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), because it exceeded $10,000; (2) declining to transfer the action to the United States Claims Court pursuant to 28 U.S.C. § 1631 because transfer would not be in the interest of justice; (3) imposing sanctions on Goad under Fed.R.Civ.P. 11; and (4) granting summary judgement to the United States on Goad's claim for declaratory relief. We affirm the dismissal for lack of jurisdiction, the refusal to transfer and the imposition of sanctions. Because the district court lacked jurisdiction over Goad's claims for declaratory relief, we vacate

the grant of summary judgement, and remand to the district court with instructions to dismiss the complaint for lack of jurisdiction. Thus we affirm-in-part and vacate-in-part.

OPINION

We agree with the parties' assertions that the district court lacked jurisdiction. Goad's monetary claims exceed $10,000, and the declaratory relief Goad seeks is subordinate to a monetary award. McKeel v. Islamic Republic of Iran, 722 F.2d 582, 590-91 (9th Cir. 1983) (district court lacked jurisdiction to declare that government actions constituted a 5th amendment taking, when plaintiff's real aim was to obtain damages of over $10,000), cert. denied, 469 U.S. 880 (1984); Gentry v. United States, 546 F.2d 343, 355 (Ct.Cl. 1976); see Bragg v. Keohane, 820 F.2d. 402, 403 (Fed. Cir. 1987) (district court

lacked jurisdiction over suit for injunctive and declaratory relief tied to damages exceeding $10,000).

The district court's lack of jurisdiction did not preclude its acting on Goad's transfer request. 28 U.S.C. § 1631. The court's thorough analysis, 1077-80, supports its conclusion that Goad's claims lacked substantive merit, and that transfer would not have been in the interest of justice. The court did not abuse its discretion in refusing to transfer the action to the Claims Court. See generally Galloway Farms, Inc. v. United States, No. 87-1458, slip op. at 6-9 (Fed.Cir. Dec. 2, 1987) (construing the "interest of justice" provision of 28 U.S.C. § 1631).

That the district court lacked jurisdiction over the action did not prevent it from imposing sanctions under Fed.R.Civ.P. 11. See Hewitt v. City of Stanton, 798 F.2d

1230 (9th Cir. 1986) (affirming imposition of sanctions on party whose attempt to remove case to federal court was frivolous); Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96 (D.N.J. 1985) (imposing sanctions on party who concealed court's lack of diversity jurisdiction). Goad has shown neither clear error in the district court's findings of fact nor error in its legal conclusions underlying its imposition of sanctions. The district court did not abuse its discretion in imposing sanctions. Thomas v. Capital Sec. Serv., Inc., 812 F.2d 984, 989 (5th Cir.) reh'g en banc granted, 822 F.2d 511 (5th Cir. 1987).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1488

ROLAND LEE GOAD,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

in CASE NO(S). H-86-3432

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED DEC. 9, 1987.

(signed)
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: DEC. 21, 1987

"Final Judgement" entered in the district court on June 5, 1987, from which Petitioner appealed to the United States Court of Appeals for the Federal Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD, Plaintiff,	
V.	CIVIL ACTION
UNITED STATES OF AMERICA, Defendant.	No. H-86-3432

FINAL JUDGEMENT

For the reasons set forth in this Court's accompanying Order, this action is hereby DISMISSED.

This is a FINAL JUDGEMENT.

SIGNED at Houston, Texas on this 5 day of June, 1987.

(signed)
DAVID HITTNER
United States District Judge

"Memorandum Opinion and Order" entered by the District Court on June 5, 1987 from which Petitioner appealed to the United States Court of Appeals for the Federal Circuit. This case has been published and is found in 661 F.Supp. 1073.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD, Plaintiff, V. UNITED STATES OF AMERICA, Defendant.	CIVIL ACTION No. H-86-3432

MEMORANDUM OPINION AND ORDER

Pending before this Court is defendant United States of America's Motion to Dismiss or, in the Alternative for Summary Judgement.[1] This Court heard oral argument on that motion on April 13, 1987.

---

[1] Where dismissal is based on consideration of matters outside the pleadings, this motion has been considered as one for summary judgement.

Having considered the motion, the submissions of the parties, the argument of Plaintiff and of counsel for Defendant, and the applicable law, the Court is of the opinion that Defendant's motion should be granted and this action should be dismissed.

FACTUAL BACKGROUND

In 1980, after thirty years of marriage, Plaintiff Roland Lee Goad and his wife, Mary Beth, were divorced. Pursuant to the divorce decree, Mrs Goad was granted twelve twenty-sevenths of Mr. Goad's Air Force retirement pay. Mr Goad refused to pay Mrs. Goad the required fraction of his retirement pay, was jailed for contempt, and was ordered to pay Mrs. Goad $30,099.42 in past-due amounts.

In 1982, Congress passed the Uniformed Services Former Spouses' Protection Act (FSPA), 10 U.S.C. § 1408 (Supp. 1985).

This act was passed primarily to remedy the inequitable result of the United States Supreme Court's decision in McCarty v. McCarty, 453 U.S. 210 (1981). The Court in McCarty had held that military retirement pay was not divisible community property because to allow division and partial grant to a spouse contravened Congress's intention that military retired pay "actually reach the beneficiary." Id. at 229-30. The FSPA overrides such an interpretation by permitting the government to honor state court orders granting a portion of military retirement benefits to former spouses of military men. The FSPA also permits, under certain circumstances, the withholding of the court-ordered amount and the direct transmittal to the former spouse. 10 U.S.C. § 1408(d) (Supp. 1985).

In June, 1985, Mrs. Goad applied for withholding of funds pursuant to the FSPA.

The Air Force Accounting and Finance Center (AFAFC) notified Plaintiff of Mrs. Goad's application. Plaintiff directed two letters of objection to the AFAFC. Finding no merit to Plaintiff's objections, the AFAFC began withholding twelve twenty-sevenths of Plaintiff's retirement pay for Mrs. Goad's benefit in September, 1985.

In December, 1985, Plaintiff requested the AFAFC to reconsider its decision. After considering Plaintiff's argument, the AFAFC denied Plaintiff's request. Following that rejection, Plaintiff brought this pro se lawsuit.

Defendant United States of America has filed the motion which is the subject of this Order, urging dismissal for lack of subject matter jurisdiction and because Plaintiff has failed to state a claim upon which relief can be had.

SUBJECT MATTER JURISDICTION

Mr. Goad's action for monetary relief must be dismissed because this Court lacks subject matter jurisdiction under the Tucker Act. The Tucker Act grants concurrent jurisdiction to the district courts and the United States Claims Court over nontort claims against the United States for damages "not exceeding $10,000 in amount." 28 U.S.C. § 1346(a)(2) (1982). Claims in excess of $10,000 are within the exclusive jurisdiction of the Court of Claims. Graham v. Henegar, 640 F.2d 732, 734-35 (5th Cir. 1981). The amount withheld from Plaintiff's retirement pay, which Plaintiff seeks to recover, is now in excess of $10,000. See Plaintiff's proposed First Amended Complaint.

Plaintiff asserts that this Court retains jurisdiction because he is making a separate claim for each month's pay that has been transferred to his former wife. These

claims, Plaintiff contends, cannot be aggregated to deprive the district court of jurisdiction. Plaintiff cites in support of his position Baker v. United States, 722 F.2d 517, 518 (9th Cir. 1983); March v. United States, 506 F.2d 1306, 1309 n.1 (D.C. Cir. 1974); A.C. Davenport & Son v. United States, 538 F.Supp. 730, 732 (N.D. Ill. 1982), aff'd, 703 F.2d 266 (7th Cir. 1983); and Fitzgerald v. Staats, 429 F.Supp. 933, 934-35 (D. D.C. 1977), aff'd, 578 F.2d 435 (D.C. Cir.), cert. denied, 439 U.S. 1004 (1978). None of these cases is applicable to the facts of Plaintiff's suit. Baker and March involved suits of various plaintiffs, none of whose individual claims exceeded $10,000. In A.C. Davenport & Son and Fitzgerald, each Plaintiff asserted more than one distinct cause of action, neither of which exceeded $10,000. In the instant case, Mr. Goad, the sole Plaintiff in this action, asserts only a single

claim, one for recovery of the money withheld from his retirement pay. He admits that this amount now exceeds $10,000. Plaintiff cannot avoid the exclusive jurisdiction of the Claims Court by characterization of each month's withholding as a separate cause of action.

Although Plaintiff seeks monetary damages within the exclusive jurisdiction of the Court of Claims, this Court declines to transfer this action pursuant to 28 U.S.C. § 1631 because to do so would not be in the interest of justice. The government cannot be held liable for making payments under the FSPA pursuant to a court order that is regular on its face. United States v. Morton, 467 U.S. 822, 836 (1984); Steel v. United States, No. 421-85C (Cl.Ct. September 12, 1986). Plaintiff has neither alleged nor shown that the court order his former wife presented to the Air Force was not regular

on its face. Thus, even were the Court to transfer Plaintiff's action, Plaintiff would not be entitled to a monetary recovery from Defendant. It is, therefore not in the interest of justice to subject the government and the Court of Claims to further expense and labor in defending against and hearing this case.

To the extent that Plaintiff seeks declaratory relief that the AFAFC's direct payments to Mrs. Goad violate statutes and the Texas and United States Constitutions, this Court has subject matter jurisdiction over Plaintiff's claims. 28 U.S.C. § 2201 (Supp. 1985). However, the Court has determined that each of Plaintiff's claims must be dismissed.

PLAINTIFF'S CLAIMS

Plaintiff's complaint purports to assert the following causes of action:

1. The AFAFC's direct payments to Mary Beth Goad are in violation of the FSPA.

2. The AFAFC's direct payments to Mary Beth Goad are prohibited by the Texas Constitution.

3. The AFAFC's direct payments to Mary Beth Goad are in violation of the Consumer Protection Act.

4. The AFAFC's direct payments to Mary Beth Goad are in violation of 37 USC § 701(e).

5. The FSPA is unconstitutional because it deprives Plaintiff of due process and equal protection.

6. The Goad's divorce decree was invalidated by the McCarty decision and cannot be resuscitated by the FSPA.

7. The FSPA is unconstitutional because it impermissibly delegates legislative power to the states.

1. Plaintiff asserts that the AFAFC's direct payments to Mrs. Goad violate the FSPA. Plaintiff bases this assertion on the remarkable premise that the Goad's divorce decree does not qualify as a "court order" that can be honored pursuant to the FSPA because it refers to military "benefits" rather than military "pay."

Plaintiff's argument is patently frivolous. Plaintiff originally posed this argument

to the AFAFC in his initial objection to direct payments to Mrs. Goad. The AFAFC advised Plaintiff at that time, and this Court reiterates, that Texas state law and the federal courts use the terms "benefits" and "pay" interchangeably. See Brown v. Robertson, 606 F.Supp. 494, 496-97 (W.D. Tex. 1985); Harrell v. Harrell, 692 S.W.2d 876 (Tex. 1985). The use of the term "benefits" in no way invalidates the divorce decree or prohibits the honor of such a decree by the AFAFC.

2. Plaintiff argues that the withholding of Mrs. Goad's share of Plaintiff's retirement pay violates the Texas Constitution's prohibition against garnishment of wages. The Court finds that the case law on this issue is clear. Although article XVI, § 28 the Texas Constitution and Tex.Civ.Pract. & Rem. § 63.004 (Vernon 1986) prohibit garnishment of "current wages," the Texas courts have expressly held that military retirement pay is

not "current wages" and thus is not exempt from garnishment under the Texas Constitution. Wager v. United States, 582 S.W.2d 896, 897 (Tex.Civ.App. - San Antonio 1979, writ dism'd); United States v. Wakefield, 572 S.W.2d 569, 572 (Tex.Civ.App. - Fort Worth 1978, writ dism'd); United States v. Fleming, 565 S.W.2d 87, 88-89 (Tex.Civ.App. - El Paso 1978, no writ).

Moreover, there is no indication that the withholding pursuant to the FSPA is in fact a garnishment, as it is applied to Mr. Goad's retirement pay. The money being withheld from Plaintiff's retirement pay is not property of Mr. Goad upon which Mrs. Goad sought to execute judgement, but in fact became Mrs. Goad's separate property with the entry of the Goad's divorce decree. The language of the decree specifically states:

> Petitioner (Mrs. Goad) is awarded the following as Petitioner's sole and separate property and Respondent (Mr. Goad) is hereby divested of all right, title

and interest in and to such property.

...

5. All right, title and interest in and to twelve/twenty-sevenths (12/27) of the United States Air Force Retirement benefits of ROLAND LEE GOAD AF# - 462368682.

The withholding and transfer to Mrs. Goad of funds which belong to her cannot properly be characterized as a garnishment. Plaintiff's claim of violation of the Texas Constitution must therefore be dismissed.

3. Similarly, Plaintiff cannot prevail in his contention that the direct payments to Mrs. Goad violate the federal Consumer Protection Act, 15 U.S.C. § 1673 (1982) which sets ceilings beyond which disposable wages cannot be garnished. The Consumer Protection Act deals with garnishment, and the withholding of Mrs Goad's funds for her own benefit simply is not garnishment.

Moreover, section 1673(b)(2) of the Consumer Protection Act allows the withholding of 50 percent and, under certain circumstances, up to 65 percent of disposable pay when such

withholding is pursuant to an "order for support." In Kahn v. Trustees of Columbia University, 109 A.D.2d 395, 492 N.Y.S.2d 33 (1985), the court construed the phrase "order for support" to apply to a court order that a husband return to his wife her share of a joint bank account. Assuming, arguendo, that the AFAFC's action could be considered a garnishment, the divorce court's order that Mrs. Goad receive twelve twenty-sevenths of Plaintiff's retirement benefits should be construed, as was the order in the Kahn case, to be an "order for support." Thus the direct payment to Mrs. Goad would not be in excess of the amount of garnishment permitted by the Consumer Protection Act.

4. Plaintiff's argument that the AFAFC's direct payments to Mrs. Goad violate 37 USC § 701(c) is equally without merit. That section provides: "An enlisted member of the Army, Navy, Air Force or Marine Corps may

not assign his pay, and if he does so, the assignment is void." This Court first notes that the direct payments to Mrs. Goad do not entail an assignment by Mr. Goad, but the enforcement of a court order to transfer to Mrs. Goad her sole and separate property. Further, to the extent that 37 U.S.C. § 701(c) might be construed as reflecting a policy against permitting the division of military retirement pay as community property, such a construction was vitiated by the passage of the FSPA, through which Congress has established a contrary intention.

5. Mr. Goad maintains that the FSPA is unconstitutional because it deprives him of property without due process and fails to afford him the equal protection of the law. These claims are frivolous.

Regarding Plaintiff's due process claim, it is fundamental that, in order to be entitled to procedural due process, Plaintiff

must possess a property interest of which he is deprived.[2] Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Findeisen v. North East Indep. School Dist., 749 F.2d 234, 237 (5th Cir. 1984), cert. denied, 471 U.S. 1125 (1985). As previously stated, a twelve twenty sevenths portion of Mr. Goad's military retirement pay became Mrs. Goad's property with the entry of the Texas divorce decree. Mr. Goad is not challenging the Texas statute tha permitted the allocation of a portion of Mr. Goad's military retirement benefits to Mrs. Goad, but is challenging the constitutionalit of the FSPA, which allows the enforcement of that allocation. The action of the AFAFC pursuant to the FSPA does not deprive Mr. Goad of property because it merely effects the transmittal to Mrs. Goad of property allocate

---

[2]Due process is also required where ther is a deprivation of liberty. Vitek v. Jones, 445 U.S. 480, 389 (1980). Plaintiff alleges no such deprivation.

and apportioned to her pursuant to state law.

Moreover, contrary to Mr. Goad's claim, extensive due process was afforded to Mr. Goad in order to insure that the funds transferred were in fact property to which Mrs. Goad was entitled. In order that direct payments can be made pursuant to a court order, the FSPA requires that the court order must be final, be regular on its face, be certified by a court official, and show that the court had jurisdiction over the member. 10 U.S.C. § 1408(c)(4) (Supp. 1985); 32 C.F.R. § 63.6 (1986). Within thirty days of receiving a court order which appears to meet the requirements for direct payments, the Air Force must give the affected member written notice of the request and thirty days to respond and present his position for consideration. 10 U.S.C. § 1408(g) (Supp. 1985); 32 C.F.R. § 63.6(f) (1986). The response, if any is made, is considered by the Air Force, and the court order is not honored if

it is shown to be defective or has been modified, superseded or set aside. 32 C.F.R. § 63.6(f)(3) (1986). After the Air Force has made a determination as to whether payments will be made, the member may request the Air Force to reconsider the decision and will receive a response explaining the decision regarding payment. 32 C.F.R. § 63.6(i) (1986).

It is thus evident that the FSPA affords a military member abundant due process before withholding funds. Mr. Goad's own submissions to this Court, copies of his correspondence with the AFAFC, evidence the fact that he took full advantage of that due process. Mr. Goad's due process claim is thus totally without merit and must be dismissed.

Plaintiff's constitutional challenge to the FSPA on the ground of denial of equal protection of the law is equally without merit. Mr. Goad cannot show that he is a member of any "suspect class" affected by the FSPA.

Thus, for the FSPA to withstand constitutional muster, it need only be shown that Congress had a rational basis for enacting the FSPA. Zobel v. Williams, 457 U.S. 55, 61 (1982). That rational basis is manifest. The Supreme Court's decision in McCarty resulted in the denial to military spouses of the opportunity to obtain and enforce awards of retirement pay, while former spouses of other federal employees enjoyed that opportunity. Recognising the contributions and sacrifices made by military spouses during military members' careers and the possibility that in some cases there might be no other community property available to former spouses, Congress passed the FSPA in order to allow military spouses to obtain their just share of community property upon dissolution of marriage. Because it rationally furthers a legitimate governmental purpose, the FSPA clearly does not deprive Plaintiff of equal protection of the law. His

equal protection claim must therefore be dismissed.

6. Plaintiff further argues that the Goads' divorce decree was invalidated by the McCarty decision and that the FSPA cannot be given retroactive effect in order to resuscitate the divorce decree. This argument has been repeatedly rejected by both state and federal courts. Wilson v. Wilson, 667 F.2d 497, 499 (5th Cir.), cert. denied, 455 U.S. 1107 (1982); Brown v. Robertson, 604 F.Supp. 494, 496 (W.D. Tex. 1985); Segrest v. Segrest 649 S.W.2d 610, 613 (Tex. 1983), cert. denied 464 U.S. 894 (1983). The courts have declined to apply McCarty retroactively to invalidate divorce decrees which were final before the McCarty decision. Thus, the Goads' divorce decree remains in effect, and the FSPA does not resuscitate it, but merely implements it.

7. Finally, Plaintiff asserts that the FSPA is unconstitutional because it impermissibly delegates legislative power to the states

The Court notes initially that Plaintiff lacks standing to assert this claim. Through this claim Plaintiff appears to be challenging the constitutionality of the FSPA in its entirety. Because McCarty is not retroactive, the divorce decree dividing Mr. Goad's retirement pay has always remained valid. Thus, the FSPA, insofar as it sanctioned such divisions, had no effect on Mr. Goad. The FSPA only affects Mr. Goad insofar as it permits the direct withholding of Mrs. Goad's funds. Mr. Goad has standing only to assert claims relating to that withholding. He cannot challenge the Act's constitutionality insofar as it permits states to consider military retirement benefits as divisible community property, because the division of his retirement benefits by his divorce decree always remained valid. Implementation of the FSPA in that respect does not affect or injure him. Heckler v. Matthews, 465 U.S. 728, 738 (1984).

Moreover, Plaintiff's claim has no substantial merit. The FSPA delegates no authority to the state courts to make laws or rules regarding military pay. The Act merely allows the state courts to consider military retirement pay when making property divisions under their own laws. Congress retains the power to exclude any and all divisions of military retirement pay.

ORDER OF DISMISSAL

Having concluded that this Court lacks subject matter jurisdiction over Plaintiff's monetary claim, that transfer of that claim pursuant to 28 U.S.C. § 1631 is inappropriate and that Plaintiff's claims for declaratory relief lack merit, it is

ORDERED that Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgement be, and is hereby, GRANTED and that this action be, and is hereby DISMISSED.

SANCTIONS

Incorporating the foregoing as findings of fact and conclusions of law, the Court finds that sanctions are appropriate in this case. Fed. R. Civ. P. 11 provides:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ... If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The violation of only one clause of Rule 11 is sufficient to justify the imposition of sanctions. Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987). The Court

finds that Plaintiff has violated not merely one, but both clauses.

First, as noted above, Mr. Goad's claim are not warranted by the existing law or a good faith argument for the extension of the law, but are patently frivolous. Were Mr. Go a novice pro se litigant, his conduct might tolerated "as the product of lack of legal sophistication." State of Texas v. Gulf Wate Benefaction Co., 679 F.2d 85, 87 (5th Cir. 198 Mr. Goad is, however, a seasoned litigant wi a demonstrated facility at legal research. A such, he "cannot be treated as free to advan frivolous claims merely because (he) appear(without counsel." Gipson v. Rosenberg, 797 F 224, 226 (5th Cir. 1986) (quoting Stelley v. Commissioner, 761 F.2d 1113, 1116 (5th Cir.) (per curiam), cert. denied, 106 S.Ct. 149 (1985)

Second, this suit is clearly brought in violation of the second clause of Rule 11. Th Court cannot help but note and deplore the

meanness of spirit with which this action is brought. Mr. Goad's persistent attempts to strip Mrs. Goad of the property granted to her by the divorce decree and to punish the AFAFC for honoring the decree can only be characterized as harassment.

When the state court granted Mrs. Goad a divorce, it made a division of community property it deemed "just and right." Tex.Fam. Code Ann. § 3.63 (Vernon 1987). Mr. Goad asserts that he does not seek to change one "jot or dot on the divorce judgement." See Plaintiff's Reply to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgement. Yet, given the history of Plaintiff's actions, it strains the credulity of this Court to suggest that Mr. Goad has gone through the considerable efforts of this suit with the intent, should he succeed in preventing direct payments to Mrs. Goad, of handing over to her twelve twenty-sevenths of the military pay in compliance with

the divorce decree. Rather, it is clear that Mr. Goad seeks by this action to harass Mrs. Goad and eventually to deprive her of justice and to establish for himself a windfall.

Further, Plaintiff's conduct in this Cour has deprived the Court of time desperately needed for legitimate complaints. This Court and the attorneys for the Defendants have expended long hours and a considerable amount of money on this case. The taxpayers should not have to bear the cost incurred as a result of Plaintiff's frivolous pleadings and motions in this Court. Plaintiff's pro se status does not give him a "license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986).

The Court notes that Plaintiff has not limited his litigation to the instant suit. Plaintiff has also filed a federal suit, alleging violation of his civil rights and naming

as defendants his former wife and some twenty judicial officers, jail officials, county commissioners, and attorneys who were involved in the state court divorce and contempt actions. In addition, Plaintiff has brought a state court action against Mrs. Goad and the Commander of the AFAFC in which he has made allegations similar to those in the instant case. He has also counterclaimed in a state court case filed by Mrs. Goad against him and joined the Commander of the AFAFC as third party defendant in that action.[3] The persistence and pervasiveness of Mr. Goad's litigation campaign is further evidence that his intent is to harass.

---

[3] The AFAFC removed both state court actions to federal court where they were consolidated in another judge's docket as Civil Action No. H-86-3548 and have been dismissed.

Defendants have submitted statements detailing the hours involved and the costs incurred defending this action. Defendants seek sanctions in the amount of $4,748.40 to compensate them for time and money expended. This Court finds Defendants' request reasonable. It is therefore

ORDERED that sanctions in the amount of $4,748.40 be, and are hereby, imposed upon Plaintiff. As an additional nonmonetary sanction, it is further

ORDERED that Plaintiff Roland Lee Goad shall not file with this Court any further causes of action until all monetary sanctions imposed have been paid in full and satisfactory proof thereof has bee furnished. See Farguson v. MBank Houston, N.A., 808 F.2d 358 (5th Cir. 1986).

SIGNED at Houston, Texas on this 5 day of June, 1987.

(signed)
DAVID HITTNER
United States District Judge

Plaintiff's Original Petition filed in the District Court on September 8, 1986 which formed the basis for the District Court's Opinion and order (661 F.Supp. 1073) (App. C, 7a-33a).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD Plaintiff	CIVIL ACTION
vs	NO. H-86-3432
UNITED STATES OF AMERICA Defendant	

PLAINTIFF'S ORIGINAL PETITION

I

These are claims for amounts of Plaintiff's salary that have been unlawfully withheld from his pay by the Commander, Air Force Accounting and Finance Center pursuant to the Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408).

II

Jurisdiction of this action is conferred on this Court by Title 28, United States Code, Section 1346(a)(2)(The Tucker Act). The statute

gives district courts concurrent jurisdiction with the United States Claims Court over actions to recover fees, salary or compensation for official services of officers or employees of the United States. Each claim is for less than the $10,000.00 jurisdictional ceiling for such claims filed in this Court.

III

These claims arose each month beginning September 3, 1985 as is hereinafter more fully set forth.

IV

CLAIMS

Claim No.	Amount of Claim	Date Claim Arose
1	$704.01	September 3, 1985
2	704.01	October 1, 1985
3	704.01	November 1, 1985
4	704.01	December 2, 1985
5	706.90	January 2, 1986
6	706.90	February 1, 1986
7	706.90	March 1, 1986

8	$686.90	April 1, 1986
9	686.90	May 1, 1986
10	686.90	June 2, 1986
11	686.90	July 1, 1986
12	686.90	August 1, 1986
13	686.90	September 2, 1986
TOTAL	$9,058.14	

V

FACTS

1. Plaintiff is an enlisted member of the Regular Air Force in retired status entitled to earn non-disability retired pay for his military service. Plaintiff was divorced pursuant to a decree signed by a visiting judge of the 272nd District Court of Brazos County, Texas on September 19, 1980. No appeal was taken. In the division of community property, Plaintiff's former spouse was awarded a fraction of Plaintiff's "Air Force retirement benefits".

2. On June 26, 1981 the United States Supreme Court held that military non-disability retired pay was not community property subject

to division at divorce. McCarty v. McCarty, 453 U.S. 210 (1981).

3. The "Uniformed Services Former Spouses' Protection Act" was subsequently enacted, effective February 1, 1983, purporting to retroactively annul the McCarty opinion. Title 10, U.S.C., Section 1408(a)(2)(C), as amended by Public Law 98-525, effective October 19, 1984 (98 Stat. 2547, 2548) and 32 C.F.R. Part 63.3(e) (July 1, 1985) provide in relevant part:

> "In the case of a division of property, the court order must specify that the payment is to be made from the member's disposable retired pay."

4. On June 24, 1985 Plaintiff's former spouse requested the Commander of the Air Force Accounting and Finance Center to honor the 1980 divorce decree as a "court order" and make payments to her of a portion of Plaintiff's pay. Her request was approved on June 28, 1985 and payments began on September 3, 1985 and have continued each month.

5. On July 5, 1985 and again on December 23, 1985 the Plaintiff made formal written objections challenging the Air Force's authority to honor the decree of divorce as a "court order". Plaintiff's objections were summarily dismissed by the Air Force.

VI

BASIS FOR CLAIMS

1. The term "Air Force retirement benefits" as used in the decree of divorce renders subject decree ineffective and insufficient to satisfy the mandatory requirements of a "court order" as defined in the controlling law. Pursuant to the express terms of the "Uniformed Services Former Spouses' Protection Act" the Air Force is without authority to honor the divorce decree as a "court order". There exists no discretionary power for the Air Force to honor a divorce decree not in conformance with the Act. Whatever meaning or importance is attached to the term "Air Force retirement benefits", it cannot be claimed to invalidate the positive

provisions of the Act authorizing the Air Force to only honor those orders that treat "retired pay" as community property.

2. Execution against Plaintiff's pay operates as a prohibited garnishment action that contravenes express provisions of federal law and deprives the Plaintiff of both Federal and State exemptions under garnishment statutes and therefore violates the proscription in 15 U.S.C. 1673(c) that no court may make, execute, or enforce any order or process in violation of that section.

3. Execution or garnishment of Plaintiff's pay conflicts with the self-executing provisions of 37 U.S.C. 701(c) that an enlisted member of the Air Force may not assign his pay, and if he does so, the assignment is void.

4. The "Uniformed Services Former Spouses' Protection Act", as implemented by the Department of Defense, has unconstitutionally deprived the Plaintiff of his property without due process of law and also deprived Plaintiff of his

right to equal protection of the law. The Act has effectively denied Plaintiff of any forum for challenging the validity of the Air Force's action in diverting a portion of Plaintiff's pay to his former spouse, and is therefore constitutionally infirm as violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. The "Uniformed Services Former Spouses' Protection Act" is unconstitutional to the extent that it delegates legislative power to state courts for the purpose of determining entitlement to federal compensation and also violates the Constitution and laws of the United by authorizing the Air Force to disburse Plaintiff's military pay to an individual not in the armed forces, thus diverting the federal funds to an object for which funds were not appropriated.

6. The "Uniformed Services Former Spouses' Protection Act" may not apply retroactively to annul a decision of the United States Supreme

Court. Congress' declaration that the Act applies to events or court decisions which occurred prior to the effective date of the statute represents a legislative attempt to retroactively apply new statutory language and to thereby annul a prior decision of the Supreme Court. This was an assumption, by Congress, of the role of a court of last resort in contravention of the principles of separation of powers. Congress cannot override a decision of the Supreme Court by declaring that the new statute applies retroactively to cases decided before its effective date. Indeed it is difficult to see how the Congress could more palpably invade the exclusive province of the Supreme Court and effectually usurp its functions, than to pass this Act which operates to set aside or annul a judgement of the Supreme Court, in its nature final, and which would otherwise be conclusive of the questions now before this Court. The decision in McCarty v. McCarty, 453 U.S. 210 (1981) applied settled

precedents that go back to 1881 and beyond and should, therefore, be given full retroactive effect to judgements rendered before June 26,1981.

VII

WHEREFORE, Plaintiff prays that judgement be entered against the Defendant, United States of America, and in favor of the Plaintiff, in the amount of $9,058.14, together with interest thereon as provided by law, and costs and disbursements of this proceeding.

Respectfully submitted.

Signed: September 8, 1986.

(signed)
ROLAND LEE GOAD, Plaintiff
310 Sara Lane
Huntsville, Texas
(409) 291-2430

Petitioner's motion to consolidate actions removed from state court filed on Oct. 10, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD Plaintiff VS UNITED STATES OF AMERICA Defendant	CIVIL ACTION NO. H-86-3432
AND	
MARY BETH GOAD Plaintiff/Cross Def. VS ROLAND LEE GOAD Defendant/Cross Plaintiff and COMMANDER, UNITED STATES AIR FORCE ACCOUNTING AND FINANCE CENTER Garnishee & Cross Def.	CIVIL ACTION NO. H-86-3548

PLAINTIFF'S MOTION TO CONSOLIDATE ACTIONS

I

Plaintiff, ROLAND LEE GOAD, respectfully moves the Court for an order pursuant to Rule

42(a) of the Federal Rules of Civil Procedure directing a joint hearing or trial of all issues in the separate pending actions that are identified in the caption of this motion, and in support thereof shows the Court:

II

On October 19, 1981, MARY BETH GOAD brought an action in the 272nd District Court of Brazos County, Cause 23,296, styled MARY BETH GOAD vs. ROLAND LEE GOAD, purporting to be a bill of review. Her action was never brought to trial.

III

On June 24, 1985, MARY BETH GOAD filed DD Form 2293 "Request for Former Spouse Payments From Retired Pay" with the Commander, Air Force Accounting and Finance Center garnishing Plaintiff's pay. Her request was approved.

IV

On January 29, 1986, Plaintiff filed counterclaims in Cause 23,296 (the bill of review) seeking an order quashing, dissolving and recalling the writ of garnishment. Plaintiff's

counterclaims have never come to trial or hearing.

V

On June 5, 1986 the Plaintiff brought an original action in the 272nd District Court of Brazos County, Texas, Cause 28,082, styled ROLAND LEE GOAD, Plaintiff, vs. COMMANDER, AIR FORCE ACCOUNTING AND FINANCE CENTER, Garnishee and Defendant, and MARY BETH GOAD, Co-Defendant, seeking an order dissolving the writ of garnishment. Plaintiff's petition has never come to trial or hearing in the 272nd District Court.

VI

On September 15, 1986, the Commander, Air Force Accounting and Finance Center, by and through Henry K. Oncken, United States Attorney for the Southern District of Texas, filed with the Clerk of this Court, a petition for removal of the above-described pending State actions. That petition is now before this Court.

VII

Rule 42(a) of the Federal Rules of Civil Procedure provides in relevant part that when actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions.

WHEREFORE, Plaintiff moves the Court for an order pursuant to Local Rule 14 E. consolidating the pending actions described in the caption to this motion.

Respectfully submitted.

Attachment:
Proposed order

Signed:
October 10, 1986

(signed)
ROLAND LEE GOAD, Plaintiff (pro se)
310 Sara Lane
Huntsville, Texas 77340
(409) 291-2430

Excerpt from a pleading filed in the District Court on December 1, 1986 by the Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD Plaintiff	)	
	)	CIVIL ACTION
v.	)	NO. H-86-3432
	)	
UNITED STATES OF AMERICA Defendant	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGEMENT

* * * * *

page 15

Assuming, arguendo, that the Court does find jurisdiction exists to consider Plaintiff's claims, then he should be required to join Mary Beth Goad in this action because she is an indispensable party under Fed.R.Civ.P. 19(a)because she unquestionably has an interest in the subject matter of this action, i.e. a portion of community property awarded to her by a Texas state court. * * * * *

Excerpt from a pleading filed in the District Court on December 9, 1986 by the Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD)

V.) CIVIL ACTION

UNITED STATES OF AMERICA) NO. H-86-3432

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGEMENT

* * * * *

page 5

11. Defendant seeks to convert Plaintiff's Tucker Act claims into a domestic relations dispute and thus either:(a.)deprive this court of jurisdiction, or (b) inject extraneous and irrelevant matters and issues into this case.

12. Plaintiff and his former spouse are already involved in three (3) civil actions pending in this District Court:(a) Civil Action H-86-3433 pending before Judge Gabrielle K. McDonald. A case brought pursuant to the Civil Rights Act, seeking damages for deprivation of

right under color of law. (42 U.S.C. 1983). (b) Cause 23,296, filed October 19, 1981 and counterclaims therein filed on January 29,1986, removed to this Court on October 16, 1986. (c) Cause 28,082, filed June 5, 1986, removed to this court on October 16, 1986. These two causes are pending under Civil Action H-86-3548. A motion is pending in this action for the consolidation of the two removed actions with this case.

13. Either a consolidation of the actions or a joint hearing on Plaintiff's pending motions for summary judgement in those pending actions will adequately accomodate Mary Beth Goad's interests.

14. Plaintiff, in this action, seeks no relief against his former spouse. His Tucker Act claims are only related to the other actions in a peripheral way.

* * * * *

Plaintiff's motion to transfer filed in the district court on April 15, 1987.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD §
§ CIVIL ACTION
VS §
§ NO. H-86-3432
UNITED STATES OF AMERICA §

PLAINTIFF'S MOTION TO TRANSFER CASE TO THE UNITED STATES CLAIMS COURT TO CURE WANT OF JURISDICTION

TO THE HONORABLE JUDGE:

Plaintiff, ROLAND LEE GOAD, respectfully moves the Court, pursuant to Title 28, United States Code, Section 1631, for an order transferring this case to the United States Claims Court.

I

A memorandum supporting this motion is being filed this date.

II

If approved, request an order be entered substantially in the form attached hereto.

Signed: April 15, 1987. Respectfully submitted.

* * * * *

Motion for summary judgement filed on Dec. 1, 1986 in H-86-3548 (the companion case mentioned at p. 32a and 661 F.Supp. at 1081 n.3).

IN THE UNITED STATES DISTRICT COURT OF
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARY BETH GOAD Plaintiff/Cross Def. VS ROLAND LEE GOAD Defendant/Cross Plntf. and COMMANDER, UNITED STATES AIR FORCE ACCOUNTING AND FINANCE CENTER Garnishee & Cross Def.	CIVIL ACTION NO. H-86-3548

CROSS-PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

Cross-Plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court to enter summary judgement for the Cross-Plaintiff on the grounds that there is no genuine issue as to any material fact, and that the Cross-Plaintiff is entitled to judgement as a matter of law.

* * * * *

PRAYER

Cross-Plaintiff moves the Court for the following specific relief:

1. Enter an order granting MARY BETH GOAD's motion for non-suit filed on January 9, 1985, in Cause 23,296, in the 272nd District Court of Brazos County.

2. Enter an order dissolving the injunction that appears of record in Volume 42, Pages 364A and 364B of the minutes of the 272nd District Court of Brazos County, Texas, in Cause 23,296; and order that the $500.00 bond approved in subject injunction be paid to ROLAND LEE GOAD.

3. Enter an order quashing, dissolving, and recalling the writ of garnishment (DD Form 2293) served on the Commander, Air Force Accounting and Finance Center by MARY BETH GOAD on June 24, 1985.

4. In the exercise of the Court's authority pursuant to Title 28, United States Code, Section 2201, and to remove the uncertainty and to

declare the rights of the parties, Cross-Plaintiff moves the Court to enter a declaratory judgement to the effect that:

a. The term "Air Force retirement benefits" as used in the Decree of Divorce renders subject decree ineffective and insufficient to satisfy the mandatory requirements of a "court order" as that term is defined in the relevant statutes.

b. The Cross-Defendant, MARY BETH GOAD, having the right to pursue one of several inconsistent remedies and having chosen a bill of review and an injunction, is now barred from pursuing any inconsistent remedy to reach Cross-Plaintiff's estate.

5. Enter an order granting Cross-Plaintiff his costs in this Court, and in the 272nd District Court prior to removal, including what would be reasonable attorney fees and such other and further relief as, to the Court, seems fair and just.

Signed: December 1, 1986

Stipulation filed by Petitioner on April 15, 1987 in the companion case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARY BETH GOAD Plaintiff/Cross Def.	
VS	
ROLAND LEE GOAD Defendant/Cross. Plntf.	CIVIL ACTION NO. 86-3548
and	
COMMANDER, UNITED STATES AIR FORCE ACCOUNTING AND FINANCE CENTER Garnishee & Cross Def.	

CROSS-PLAINTIFF'S STIPULATION PERTAINING TO FEDERAL DEFENDANT'S LIABILITY

TO THE HONORABLE JUDGE:

Cross-Plaintiff, ROLAND LEE GOAD, stipulates (for the purpose of this action only) that he voluntarily relinquishes any claim for costs or other monetary relief against the Commander, Air Force Accounting and Finance Center.

I

The Commander of the Air Force Accounting and Finance Center was made a defendant in this action solely for the purpose of insuring that

he would be bound to honor any order dissolving the writ of garnishment that is the subject of Cross-Plaintiff's claim.

II

If the Federal Defendant should agree to honor an order dissolving the writ of garnishment, Cross-Plaintiff would interpose no objection to the dismissal of the Federal Defendant from this action without prejudice.

Respectfully submitted.

Signed: April 15, 1987

ROLAND LEE GOAD, Cross-Plaintiff (pro se)
310 Sara Lane
Huntsville, Texas 77340
(409) 291-2430

In its opinion (661 F.Supp. 1081 n.3) the district court refers to a companion case removed from state court and dismissed. This is the memorandum and order of dismissal in that case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARY BETH GOAD Plaintiff/Cross Def.	
VS	CIVIL ACTION
ROLAND LEE GOAD Defendant/Cross Pl.	NO. H-86-3548
and	
COMMANDER, UNITED STATES AIR FORCE ACCOUNTING AND FINANCE CENTER, Garnishee & Cross Deft.	

MEMORANDUM AND ORDER OF DISMISSAL

Pending before the Court is Defendant Commander, United States Air Force Accounting and Finance Center's (the Center) motion to dismiss under Rule 12(b)(1).

Roland Goad's complaint against the Center and Defendant Mary Beth Goad seeks a declaratory judgement that the Center was without authority to dissolve the "writ of garnishment" and directly pay to Defendant Mary Beth Goad retirement benefits.

It is well established law that the Federal Government cannot be sued without a waiver of sovereign immunity. See Wright and Miller, Federal Practice and Procedure at §3655. The Declaratory Judgement Act does not act as such a waiver. The statute at issue, 10 U.S.C. §1408(f)(1), also does not provide a waiver.

Apparently realizing that there was no waiver of sovereign immunity, Mr. Goad has filed a stipulation of dismissal of the federal defendant. At the pretrial conference Mr. Goad stated that this dismissal was unconditional.

With the Center out of the case, the Court is left with Roland and Mary Beth Goad. There is no federal subject matter jurisdiction arising from the claims and counterclaims of these two parties. Again, the Declaratory Judgement Act does not provide an independent basis for federal question jurisdiction. See 28 U.S.C. §2201(a). The Court also notes that Mr. Goad has failed to

state a claim upon which relief can be granted against Mary Beth Goad, and all of Mary Beth Goad's claims appear to be moot. For the foregoing reasons, the Court

ORDERS Defendant Commander, United States Air Force Accounting and Finance Center DISMISSED with prejudice. The Court further

ORDERS the claims between Roland and Mary Beth Goad DISMISSED without prejudice under Federal Rule of Civil Procedure 12(h)(3).

DONE in Houston, Texas, this 16th day of April, 1987.

(signed)

James DeAnda
UNITED STATED DISTRICT JUDGE

Petitioner's memorandum opposing the government's request for costs and fees, filed in the district court on May 4, 1987.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLAND LEE GOAD	§	
		CIVIL ACTION
VS	§	
		NO. H-86-3432
UNITED STATES OF AMERICA	§	

PLAINTIFF'S RRSPONSE TO DEFENDANT'S MEMORANDUM IN SUPPORT OF AWARD OF COSTS AND ATTORNEY'S FEES

TO THE HONORABLE JUDGE:

1. The federal defendant is not entitled to an award of attorney's fees in this civil action. Title 28, U.S. Code, Section 2412(a) provides in part:

> Except as otherwise specifically provided by statute, a judgement for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. (Emphasis supplied)

2. This statute precludes the award of attorney's fees to a prevailing party in an action against the United States or any agency

or official thereof, even though the prevailing party may recover his costs as provided in Section 1920, of Title 28 U.S. Code. For instance:

> "... it seems basic that if a party is immune from an award of attorney's fees as such, that immunity is not altered by taxing fees as part of costs. If the award is void in one form, it is void in the other."

Jordon v. Gilligan, 500 F.2d 701, 705 (CA 6 1974) cert.den. 421 U.S. 991 (1975).

3. It is true that federal courts, in the exercise of their equitable powers, may award attorney's fees when the interests of justice so require. The Supreme Court in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-9 (1975), noted that attorney's fees may be awarded by a federal court where "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" But that exception does not apply here. Plaintiff has engaged in absolutely no vexatious behavior. There has been no need for discovery be either side, there has been no failure or delay in making timely responses to the pleadings and motions filed by the

defendant. Plaintiff has sought no continuances or other delay to any proceeding. The only delay has been occasioned by the desire of defendant's cocounsel to attend the hearing in April. The federal defendant has not been subjected to any kind of harrassment or vexation from this Plaintiff that would justify the imposition of any sanctions.

4. Costs that merely are incidental to the trial or are incurred in preparation for it will not be considered "necessarily" incurred "for use in the case" for purposes of Section 1920 and will not be allowed under local rule, custom and usage, or the court's inherent power. As a result such items as transportation or a computer search are not subject to recovery as costs. Also travel of attorneys are disallowed unless the attorney is to appear as a witness. See: City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1371 (CA 1 1971); Richerson v. Jones, 506 F.Supp. 1259, 1267 (E.D. Pa. 1981); 10 Wright, Miller & Kane, Federal Practice & Procedure, Section 2677 at 370-1 (2nd. Ed. 1983).

5. Major Barton seeks costs for:

Computer research	$730.00
Travel costs	578.90
Attorney's fees	2,556.95

But none of these items are taxable as costs pursuant to 28 U.S.C. 1920 or 2412(a).

6. Mister Jenkins wants an imposition of costs for:

Attorney fees	$872.55
Copying	10.00

If the copies were necessary in the case, this cost is taxable. Such costs are taxable pursuant to 28 U.S.C. 1920(4) only to the extent that such copying was necessary for use in the case. Making an extra copy for cocounsel would likely not fall within the provisions of the statute. Mister Jenkins' attorney fees are not taxable (28 U.S.C. 2412(a)), and if they were, several of his entries probably would not belong in the costs of <u>this case</u>:

01/09/87 Conversation with Mr. Rudy Cano

01/07/87 Conversation with Ms. Sinderson

03/11/87 Review of opposition to non-party motion

04/10/87 Library research of article unrelated to this case

7. When Plaintiff brought his original complaint in this Court on September 8, 1986, he sought $9,058.14 for thirteen (13) claims that had accrued at that time. This was an amount within this Court's Tucker Act jurisdiction whether or not the claims were to be aggregated. Only if the claims that have accrued since the filing of this action are to be aggregated into one "claim" has this Court lost jurisdiction of this case. If these separate claims are not to be aggregated, this Court should dispose of this case on the merits. If all the claims are to be aggregated as the federal defendant asserts they should, jurisdiction of this case lies exclusively in the United States Claims Court and it should be transferred. In either instance, the taxation of costs should abide the determination on the merits. ...